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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ANTONE HUTCHINSON, Defendant and Appellant.	B299078 (Los Angeles County Super. Ct. No. NA102378)

APPEAL from an order of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Acting Senior Assistant Attorney General, Amanda V. Lopez and Heidi Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

This appeal requires us to decide whether a defendant who pleads guilty to unpremeditated attempted murder is entitled to resentencing pursuant to Penal Code section 1170.95 and Senate Bill No, 1437. Our answer is no.

FACTUAL BACKGROUND

In 2017, appellant Antone Hutchinson pled guilty to one count of unpremeditated attempted murder, for which he was sentenced to the high term of nine years; and one count of discharging a firearm at an inhabited dwelling, for which he was sentenced to one-third of the mid-term of one year eight months. He also admitted a gang allegation, for which he received an additional 10 years. Hutchinson's aggregate sentence is 20 years eight months in prison.

We do not have the record of conviction before us on appeal. With no preliminary hearing transcript, information, probation report, or other document to provide the facts underlying Hutchinson's offense, we rely on Hutchinson's reply to the People's opposition to his petition for resentencing to provide skeletal details of the offense. On appeal neither party disputes the facts of the offenses as set out in this opinion. Details of what transpired in the trial court with respect to the guilty plea, however, remain opaque.

Upon their request, appellant Hutchinson agreed to give Deshawn Freeman and Dyllin Pressey a ride to a store. When Hutchinson later pulled over, Freeman and Pressey exited the car and began shooting. Four people were injured. Freeman then ordered Hutchinson to drive across town, where Freeman and Pressey again exited the car and one of them shot at a building.

PROCEDURAL BACKGROUND

On January 11, 2019, Hutchinson filed a petition for resentencing under Penal Code section 1170.95.[1] Hutchinson alleged: (1) a complaint, information, or indictment was filed against him that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine; (2) he pled guilty or no contest to first or second degree murder in lieu of going to trial because he believed he could have been convicted of first or second degree murder at trial pursuant to the felony murder rule or the natural and probable consequences doctrine; and (3) he could not now be convicted of first or second degree murder because of changes made to Sections 188 and 189.

The People opposed the petition on statutory and constitutional grounds. The constitutional grounds are not at issue on appeal so we do not discuss them. As to the statutory grounds, the People argued Hutchinson was not convicted of murder under a felony murder or natural and probable consequences theory. Rather, he was convicted of attempted murder. The People also argued section 1170.95 applies to convictions for first or second degree murder only, not attempted murder. The People concluded Hutchinson was not eligible for resentencing because his culpability for attempted murder arose from aiding and abetting the crimes to which he pled guilty.

In his reply, Hutchinson argued he could not have been convicted of attempted murder under any theory other than the natural and probable consequences doctrine because Freeman

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[1] All further references are to the Penal Code unless otherwise indicated.

was never charged with a crime related to the incident and Pressey's juvenile transfer hearing under Proposition 57 was still pending in the juvenile court. Although he was not convicted of murder, Hutchinson urged the court to conclude that the Legislature intended to include within the ameliorative provisions of Senate Bill No. 1437 the crime of attempted murder based on the natural and probable consequences doctrine. Hutchinson also alleged in his reply that he was factually innocent of the charges and pleaded guilty because he could not safely testify in his own behalf.

The court denied the section 1170.95 petition, finding Hutchinson "was not convicted under a theory of felony murder or natural and probable consequences. In fact, he was not convicted of murder and pled to attempted murder and shooting at an inhabited dwelling with a gang allegation. Nor was he ever charged with murder."

Hutchinson filed a motion for reconsideration. The court denied the motion, determining Hutchinson "necessarily would have an intent to kill as an aider and abettor to attempted murder. With an intent to kill, petitioner is not entitled to resentencing."[2]

Hutchinson timely appealed.

DISCUSSION

The doctrine of natural and probable consequences is an aiding and abetting theory whereby a defendant guilty of one crime (the target crime) is also held liable for a crime committed

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[2] All further references are to the Penal Code unless otherwise indicated.

by an accomplice (the nontarget crime) that a reasonable person would know was a natural and probable consequence of the target crime committed by the defendant. (CALCRIM 402; *People v. Chiu* (2014) 59 Cal.4th 155, 161-162.)

In 2018, the Legislature enacted Senate Bill No. 1437 to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) Senate Bill No. 1437 amended the definition of malice in section 188 to provide, "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).)

As of January 1, 2019, the effective date of Senate Bill No. 1437, a person can no longer be liable for murder under the natural and probable consequences doctrine. (*People v. Lopez* (2019) 38 Cal.App.5th 1087, 1093 (*Lopez*).)

Pursuant to Senate Bill No. 1437, the Legislature also added section 1170.95, which permits those "convicted of . . . murder under a natural and probable consequences theory" to "file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts." (§ 1170.95, subd. (a).) The court may only grant the petition upon a prima facie showing that: "(1) [a] complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed

under a theory of felony murder or murder under the natural and probable consequences doctrine[;] (2) [t]he petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder[; and] (3) [t]he petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a).) Those convicted of murder under a natural and probable consequences theory whose convictions are not final may not obtain relief on direct appeal; instead they must use the petitioning procedure outlined in Section 1170.95. (*People v. Martinez* (2019) 31 Cal.App.5th 719, 722; *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1147.)

Two cases have held that *all* ameliorative provisions in Senate Bill No. 1437 do not apply to final or nonfinal convictions for *attempted* murder under a natural and probable consequences theory. (*Lopez, supra,* 38 Cal.App.5th at p. 1093; *People v. Munoz* (2019) 39 Cal.App.5th 738, 743 (*Munoz*).) Two cases have held that although section 1170.95 is not available to those convicted of attempted premeditated murder under a natural and consequences theory, Senate Bill No. 1437 did eliminate liability for attempted murder under a natural and probable consequences theory. (*People v. Medrano* (2019) 42 Cal.App.5th 1001, 1008; *People v. Larios* (2019) 42 Cal.App.5th 956, 996.) *People v. Medrano* further held that Senate Bill No. 1437 is retroactive to nonfinal judgments on appeal. (*Medrano*, at p. 1008.) The issue is now under review by the California Supreme Court in *People v. Lopez*, review granted November 13, 2019, S258175; *People v. Munoz*, review granted November 26, 2019, S258234; *People v. Medrano*, review granted March 11, 2020, S259948; *People v.*

Larios, review granted February 26, 2020, S259983; and *People v. Mejia,* review granted January 2, 2020, S258796. Specifically, the Supreme Court asked for briefing on the following two issues: "(1) Does Senate Bill No. 1437 (Stats. 2018, ch. 1015) apply to attempted murder liability under the natural and probable consequences doctrine? (2) In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor* (2012) 54 Cal.4th 868 [143 Cal.Rptr.3d 659, 279 P.3d 1131] be reconsidered in light of *Alleyne v. United States* (2013) 570 U.S. 99 [186 L.Ed.2d 314, 133 S.Ct. 2151] and *People v. Chiu* (2014) 59 Cal.4th 155 [172 Cal.Rptr.3d 438, 325 P.3d 972]?" (*People v. Lopez,* S258175, Supreme Ct. Mins. Nov. 13, 2019.)

As the law stands today, no court has held that persons convicted of attempted murder whose convictions are final are eligible for relief under Section 1170.95.

Hutchinson urges us to so hold. He raises three arguments: (1) principles of statutory interpretation reveal the Legislature intended section 1170.95 to apply to attempted murder convictions; (2) excluding those convicted of attempted murder from obtaining relief under 1170.95 violates the right to equal protection under the California and United States Constitutions; and (3) because attempted murder requires a finding the defendant personally harbored the intent to kill, i.e., malice, and because malice can no longer be imputed vicariously to a defendant under the natural and probable consequences doctrine, the legislature must have intended to eliminate the

applicability of the natural and probable consequences to attempted murder. For the last argument, appellant relies on *People v. Fontenot* (2019) 8 Cal.5th 57 (*Fontenot*), *People v. Chiu, supra,* 59 Cal.4th 155, *People v. Favor* (2012) 54 Cal.4th 868 (*Favor*), and *People v. Mejia*, *supra*, 40 Cal.App.5th 42, which we discuss below.

Our district has previously rejected appellant's arguments. In *Lopez* and *Munoz*, our colleagues in the Seventh and Fourth Divisions, respectively, thoroughly addressed whether Senate Bill No. 1437 applies to attempted murder convictions and concluded it does not. We agree with and do not here repeat their reasoned analyses and conclusions.

Nevertheless, we make three notes.

First, Hutchinson alleges the trial court incorrectly concluded Hutchinson, as an aider and abettor to attempted murder, must have had the intent to kill.[3] Yet, this was a plea for which Hutchinson has provided no record. We do not know under what theory Hutchinson entered his plea because Hutchinson has not carried his burden as appellant to provide an adequate record on appeal. Nor have we been provided with a charging document. Consequently we do not know under what alleged theories Hutchinson was prosecuted. We know, based on his sentence of nine years, Hutchinson was convicted of un-

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[3] We must correct Hutchinson on one point: the court denied Hutchinson's motion for reconsideration, not the original petition, based on its conclusion Hutchinson was a direct aider and abettor. The trial court had already denied Hutchinson's original petition, finding Hutchinson was not convicted under a felony murder or natural and probable consequences theory, and that he was not convicted of murder at all.

premeditated attempted murder as pre-meditated attempted murder carries a mandatory statutory sentence of life with the possibility of parole after seven years. (§§ 664 subd. (a); 3046, subd. (a)(1).) In any event, for all we know, Hutchinson admitted facts at his plea establishing that Freeman or Pressey was the direct perpetrator, whom he knowingly aided and abetted. We don't know, and the absence of that information renders it impossible for us to accept as fact that Hutchinson pleaded guilty under the natural and probable consequences theory of culpability.

Nevertheless, the issue is moot because we conclude section 1170.95 decidedly does not apply to those convicted of attempted murder under the natural and probable consequences doctrine.

Second, Hutchinson argues *People v. Favor* is now disfavored precedent in light of Senate Bill No. 1437. In *Favor,* the California Supreme Court held a defendant can be liable for the nontarget offense of willful, deliberate, and premeditated attempted murder under a natural and probable consequences theory. (*Favor*, *supra*, 54 Cal.4th at p. 880.) In *Mejia*, the Fourth District disagreed, and the issue is now under review by our Supreme Court. (*Mejia, supra,* 40 Cal.App.5th at p. 50.) Nonetheless, *Favor* remains good law until the Supreme Court rules otherwise. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.). This appeal involves a conviction for attempted murder. If a defendant can be liable under a natural and probable consequences theory for attempted premeditated murder, it reasonably follows a defendant can be liable under the same theory for an unpremeditated attempted murder.

Finally, we find none of the cases relied upon by appellant help to resolve the issue at hand. The analyses in *People v. Favor*, *People v. Mejia*, and *People v. Chiu* deal with the distance between a defendant's culpability for the target crime and his or her culpability for an attempted or completed murder committed willfully and with premeditation and deliberation. *Favor, Chiu,* and *Mejia* address whether the specific *mens rea* of *willful and deliberate premeditation* can be permissibly imputed to the perpetrator of the target crime under a natural and probable consequences theory of liability. They are therefore not directly applicable to the attempted murder conviction here.

The last case relied upon by appellant, *Fontenot*, *supra*, 8 Cal.5th 57, analyzed when an attempt can properly be considered a lesser included offense of a completed crime. (*Id.* at p. 65.) "Murder, for instance, requires an act causing the death of another, but not the intent to kill, as implied malice will suffice. Attempted murder, which *does* require intent to kill, is therefore not a lesser included offense of murder." (*Id.* at p. 80, fn. 2. (conc. opn. of Kruger, J.).)

Hutchinson acknowledges, and we agree, that whether attempted murder is a lesser included offense of murder is irrelevant to the issue on appeal. Nonetheless, he posits *Fontenot* held "to be guilty of an attempt, the *mens rea* of the aiding and abetting defendant must be *at least equal* to that required by the completed crime. ([*Fontenot*], *supra,* 8 Cal.5th at p. 70.)" Not so. *Fontenot* nowhere analyzes the liability of an aider and abettor of an attempted crime. We do not find *Fontenot* apt to the factual or procedural posture of this appeal.

Ultimately, whether Senate Bill No. 1437 applies to attempted murder was for the Legislature to decide. We cannot escape the fact that the plain language of Senate Bill No. 1437 and the legislative history behind it clearly demonstrate the Legislature did not intend to include attempted murder within the ambit of its ameliorative provisions.

DISPOSITION

The order is affirmed.

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STRATTON, J.

We concur:

BIGELOW, P. J.

WILEY, J.